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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1091

ELLIOT L. RICHARDSON, Secretary of Health, Education and Welfare, *Appellant*,

v.

RAYMOND BELCHER

On Appeal From the United States District Court for the Southern District of West Virginia

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BRIEF FOR THE AMERICAN MUTUAL INSURANCE ALLIANCE, AMERICAN INSURANCE ASSOCIATION AND THE AMERICAN ASSOCIATION OF STATE COMPENSATION INSURANCE FUNDS AS AMICI CURIAE

INTEREST

This brief *amici curiae* is filed by the American Mutual Insurance Aliance (AMIA), the American Insurance Association (AIA), and the American Association of State Compensation Insurance Funds (AASCIF), with the consent of the parties, as provided in Rule 42 of the Court's Rules.

AMIA is an association of over 100 property and casualty insurance companies. Together they write almost one billion dollars annually in workmen's compensation insurance. This constitutes approximately 29 percent of the private workmen's compensation in the United States and represents almost 30 percent of their total property and liability insurance business.

AIA is also an association of over 100 property and casualty insurance companies. These companies write approximately $1.2 billion of workmen's compensation insurance annually. This constitutes 35 percent of the private workmen's compensation in the United States and represents approximately 15 percent of their total property and liability insurance business.

AASCIF is the association of state workmen's compensation insurance funds. Such state-created and state-administered funds presently exist in 18 states and represent approximately $850 million in insurance premiums annually. In six of these states, the state fund is "exclusive" (*i.e.,* employers are required in those states to insure their risks in the fund). In the remaining 12 states, the funds are "competitive" (*i.e.,* employers may elect to insure in the state fund, with a private insurance company, or to qualify as self-insurers). The state funds in all 18 states are members of AASCIF.

These associations and the companies which they represent are vitally concerned with the satisfactory operation of the nation's compensation system. They are interested in all matters affecting workmen's compensation and social security, since they believe it is important that the two systems be coordinated so that a proper development of each not be impeded. They

particularly want to insure that workmen's compensation laws continue to provide full and adequate protection and rehabilitation to those who are the victims of work-related disability.

As a result of their interest and long experience in this area, they are uniquely able to assist the Court by discussing the significance of Section 224 of the Social Security Act and the reasons why, from the point of view of the industry most intimately concerned, it is both reasonable and essential to the proper working of state workmen's compensation systems.[1] It is their position that the decision below, if allowed to stand, will jeopardize attainment of this goal.

THE NATURE OF WORKMEN'S COMPENSATION IN THE UNITED STATES

Workmen's compensation laws have existed in the United States for some 60 years as an outgrowth of the inadequacies of the common law.[2] They have now been adopted by all states and the District of Columbia and are basically similar in concept, scope and operation.

Common to all these laws is the elimination of fault as the basis of liability. The workman or his family

[1] This brief will not discuss the authorities considered at length in the Jurisdictional Statement and Brief of the United States herein and in the Motion to Affirm, filed by the United States in *Bartley, et al.* v. *Richardson*, No. 703, O.T. 1970. We endorse the position of the United States on the constitutional issues as set forth therein.

[2] See generally, LANG, WORKMEN'S COMPENSATION INSURANCE, MONOPOLY OR FREE COMPETITION?, 3-10 (Richard D. Irwin, Inc. 1947); ANALYSIS OF WORKMEN'S COMPENSATION LAWS, 3 (Chamber of Commerce of the United States 1971).

is indemnified, regardless of fault, for injuries or death arising out of employment. The benefits include medical and hospital care, usually unlimited in time and amount, periodic payments to replace wages, and rehabilitation. In essence, workmen's compensation laws hold that employers should assume the costs of occupational disabilities and that the resulting economic losses should be considered costs of production.

The enactment of workmen's compensation was an important step forward in the protection of employees. For the employee, it eliminated the uncertainties of litigation, increased his financial security, and erased the employer's defenses of contributory negligence, assumption of risk and the fellow-servant rule. It provided employers with a much-needed method of dealing with the financial hazards and uncertainties of occupational injuries.

The United States Chamber of Commerce has pointed to six basic objectives of workmen's compensation laws:

1. Provide sure, prompt and reasonable income and medical benefits to work-accident victims, or income benefits to their dependents, regardless of fault;

2. Provide a single remedy and reduce court delays, costs and work loads—arising out of personal injury litigation;

3. Relieve public and private charities of financial drains—incident to uncompensated industrial accidents;

4. Eliminate payments of fees to lawyers and witnesses as well as time-consuming trials and appeals;

5. Encourage maximum employer interests in safety and rehabilitation—through appropriate experience rating mechanisms; and

6. Promote frank study of causes of accidents (rather than concealment of fault)—reducing preventable accidents and human suffering. [ANALYSIS OF WORKMEN'S COMPENSATION LAWS, 3 (Chamber of Commerce of the United States 1971).]

Most laws require employers to meet their workmen's compensation obligations either by insurance or by proving their financial capacity to act as self-insurers. Some laws permit or require employers to acquire insurance through state-established funds. Penalties are imposed for failure to provide required coverage.

THE EXPANSION OF THE SOCIAL SECURITY LAWS TO INCLUDE DISABILITY BENEFITS

The original Social Security Act of 1935 did not provide for disability benefits. In 1956, Congress amended the law to provide for payment of benefits to those who were permanently and totally disabled and had attained the age of 50 but had not reached 65. Act of August 1, 1956, Pub. L. No. 84-880, § 103, 70 Stat. 848. The social security benefit payable to such an individual was reduced, however, by the amount of any periodic benefit payable to the recipient under a workmen's compensation law. *Id.*

This offset provision was repealed in 1958. Act of August 28, 1958, Pub. L. No. 85-840, § 206, 72 Stat. 1025. After two years' experience under the offset provision, Congress concluded that the provision could be eliminated since at that time there did not appear to be any serious duplication of benefits. At the same time, Congress further liberalized social security disability payments by providing benefits for dependents of disabled persons. 42 U.S.C. § 402. Congress again

expanded the range of beneficiaries in 1960 by eliminating the age 50 requirement. 42 U.S.C. § 423(a)(1)(B).

In 1965, Congress reinstated the workmen's compensation offset provision, but in a form different from the 1956 version. 42 U.S.C. § 424a. The 1956 provision required an offset of social security payments equal to the amount of workmen's compensation received. The 1965 provision required only that combined social security and workmen's compensation benefits could not exceed 80 percent of the "average current earnings" credited to the worker's social security account before disability. In adopting this provision, the Senate Finance Committee observed that it had "taken note of the concern that has been expressed by many witnesses in the hearings about the payment of disability benefits concurrently with benefits payable under State workmen's compensation programs." S. REP. No. 404, 89th Cong., 1st Sess. 1 *U.S. Code Cong. & Ad. News* 2040 (1965). The Committee found that it was "desirable as a matter of sound principle to prevent the payment of excessive combined benefits." *Id.* Under the new provision, a worker's benefits would never be reduced "below the amount of the unreduced monthly social security benefits." *Id.*

Moreover, in order to overcome the effect of inflation in wage levels and living costs, the offset provision now requires periodic automatic redetermination of "average current earnings." *Id.* at 2200. As a result, when wages and living costs increase, the amount of social security benefits to be offset is reduced or eliminated. Thus, the disabled worker is able to maintain the same standard of benefits. In addition, the level of disability benefits automatically increases with every basic social security increase.

At the start of 1970, 1,410, 900 disabled workers and their 1,151,000 dependents were receiving social security disability benefits.[3]

THE NEED FOR THE OFFSET PROVISION

The offset is crucial to the success of rehabilitation programs under state laws, to the continuation of vigorous employer safety programs, and to the continuance and improvement of state workmen's compensation laws.

The Offset Provision Is Crucial to the Success of State Rehabilitation Programs

A characteristic of all state workmen's compensation programs is provision for worker rehabilitation.[4] Rehabilitation has been defined as the "restoration of the handicapped workman to the fullest physical, mental, social, vocational and economic usefulness of which he is capable."[5]

Historically, the state workmen's compensation systems have provided the principal impetus for disabled worker rehabilitation. The AIA, AMIA, their member companies and the AASCIF have been leaders in developing rehabilitation programs and in urging more advanced state legislation in the area. In fact, the first clinics used exclusively for the physicial restoration of

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[3] *Research and Statistics Note No. 21, 1970* (U.S. Department of Health, Education and Welfare, November 23, 1970).

[4] Thirty-six states provide by statute for some form of rehabilitation. However, according to the Chamber of Commerce of the United States, "rehabilitation is provided in all states even if unspecified in the law." ANALYSIS OF WORKMEN'S COMPENSATION LAWS, *supra*, at 7, 30-31.

[5] *Report of the Rehabilitation Committee, International Association of Industrial Accident Boards and Commissions,* 170 (U.S. Bureau of Labor Standards, Bulletin 142)

workers in the United States were established by workmen's compensation insurance carriers.[6]

Rehabilitation gives the disabled worker the opportunity to regain his economic and social utility by returning to the ranks of the wage earners. It is equally important to employers, not only because of the advantages of restoring trained workers to their jobs, but also because the savings resulting from properly administered rehabilitation programs are passed on to employers in the form of reduced workmen's compensation rates. This results in a built-in incentive for both employers and their insurance carriers to maximize rehabilitation efforts.

Based upon their experience under the earlier provisions of the social security laws, the AIA, AMIA and AASCIF are convinced that the absence of an offset acts as a deterrent to the rehabilitation of a disabled worker. Their experience has demonstrated that which common sense suggests is true: efforts to motivate a disabled worker receiving through disability payments as much money as or more money than he had previously earned through working are frequently unsuccessful.

Under the existing levels of social security and workmen's compensation benefits, the lack of an offset provision will result in combined benefits in *excess* of average weekly take-home pay in 48 of 51 jurisdictions. As the following table demonstrates, only in three jurisdictions are combined social security and workmen's compensation benefits less than or equal to average weekly benefits—Alaska, 81%; California, 97%; and Ohio, 99%.

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[6] KULP & HALL, CASUALTY INSURANCE, 235 (Ronald Press Co. 1968).

Jurisdiction	Average Weekly Take Home Pay (a)	Workmen's Compensation Maximum Weekly Benefit (b)	Combined Workmen's Compensation and Social Security Benefits (c)	Combined Benefits as Percentage of Take-home Pay
Alabama	$ 87.77	$ 50.00	$112.08	128%
Alaska	179.26	82.55	144.63	81%
Arizona	113.24	152.50	214.58	189%
Arkansas	84.81	49.00	111.08	131%
California	118.21	52.50	114.58	97%
Colorado	102.21	59.50	121.58	119%
Connecticut	111.39	80.00	142.08	127%
Delaware	98.93	75.00	137.08	138%
Dist. of Col.	105.34	70.00	132.08	125%
Florida	94.61	56.00	118.08	125%
Georgia	91.61	50.00	112.08	122%
Hawaii	118.40	112.50	174.58	147%
Idaho	106.49	99.00	161.08	151%
Illinois	112.73	71.00	133.08	118%
Indiana	103.11	57.00	119.08	115%
Iowa	100.94	56.00	118.08	117%
Kansas	101.02	56.00	118.08	117%
Kentucky	96.05	52.00	114.08	119%
Louisiana	102.02	49.00	111.08	109%
Maine	90.79	73.00	135.08	149%
Maryland	102.10	85.00	147.08	144%
Massachusetts	108.12	88.00	150.08	139%
Michigan	119.35	104.00	166.08	139%
Minnesota	104.22	70.00	132.08	127%
Mississippi	84.15	40.00	102.08	121%
Missouri	101.33	52.00	120.08	118%
Montana	113.35	65.00	127.08	112%
Nebraska	98.13	55.00	117.08	119%

Jurisdiction	Average Weekly Take Home Pay (a)	Workmen's Compensation Maximum Weekly Benefit (b)	Combined Workmen's Compensation and Social Security Benefits (c)	Combined Benefits as Percentage of Take-home Pay
Nevada	114.53	66.46	128.94	112%
New Hampshire	97.43	67.00	129.08	132%
New Jersey	102.90	91.00	153.08	149%
New Mexico	102.58	48.00	110.08	107%
New York	105.82	80.00	142.08	134%
North Carolina	88.50	50.00	112.08	127%
North Dakota	94.22	94.00	156.08	166%
Ohio	119.20	56.00	118.08	99%
Oklahoma	93.98	49.00	111.08	118%
Oregon	114.50	62.50	124.58	109%
Pennsylvania	105.43	60.00	122.08	116%
Rhode Island	101.49	82.00	144.08	142%
South Carolina	87.07	50.00	112.08	129%
South Dakota	93.36	50.00	112.08	120%
Tennessee	89.48	47.00	109.08	122%
Texas	105.01	49.00	111.08	106%
Utah	100.22	65.00	127.08	127%
Vermont	98.23	61.00	123.08	125%
Virginia	93.30	62.00	124.08	133%
Washington	117.40	81.23	143.31	122%
West Virginia	113.40	65.50	127.58	112%
Wisconsin	101.13	79.00	141.08	139%
Wyoming	95.53	63.46	125.54	131%

(a) Average weekly wages less federal income and social security taxes (four deductions). Based upon wages of employees to whom compensation paid. National Council on Compensation Insurance, December 1969.

(b) As of December 1970. Includes maximum allowance for dependents, except in Massachusetts, Utah, Vermont and Wyoming, where benefits for additional dependents may be paid.

(c) Compensation benefits based upon a worker with a wife and two children. Social security benefits based upon average family monthly benefit as of December 1970 of $269.00, or $62.08 average weekly benefit. Source—Social Security Administration, U. S. Department of Health, Education and Welfare.

These computations, it should be noted, do not include medical payments, which are in addition to the wage replacement benefits, nor do they reflect the fact that workmen's compensation and social security benefits are not subject to taxation.

Congress enacted the offset provision in 1965 in order to restore some incentive toward rehabilitation. At the same time, Congress was liberal in its allowance so that the disabled worker would receive substantially what he had received from working. In addition, Congress provided for regular adjustment of the offset level so that benefits would keep pace with wages and the cost of living. Under these circumstances, the offset provision is a more than reasonable method of providing the essential incentive for rehabilitation.

The Offset Provision Maximizes the Incentive to States To Improve Their Benefit Structures

Although sophisticated employers are willing to accept reasonable higher compensation costs to insure that their employees will receive adequate support when injured, they are demanding greater efficiency in the benefit distribution mechanism. When duplication of benefits occurs, there is reluctance to upgrade state workmen's compensation laws.

Workmen's compensation laws in a number of states still lag in their benefit levels. Many individuals and groups have been working to improve these levels, and while such efforts have met with considerable success, continued improvement is necessary to keep pace with increases in the cost of living and improved wage scales.

There are specific examples of the way in which social security benefits reduce the pressures on the

states to provide full workmen's compensation benefits. For instance, since 1958, the year the offset provision was repealed, nine states increased benefits for temporary total disability (for which there is no social security coverage), but did not increase benefits for permanent total disability (for which there may be social security coverage).[8] It is significant that five of these nine jurisdictions first enacted this differential in 1959, the year following repeal of the original offset provision. Two states reduce workmen's compensation benefits when social security benefits are payable.[9]

Widow's benefits provide a further illustration of the chilling effect of social security. Workmen's com-

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State	Permanent Total Disability Benefit	Temporary Total Disability Benefit	Original Year of Enactment of Difference
Alaska	$73.45	$127.00	1959
California	52.50	87.50	1959
Illinois	71.00	91.00	1965
Iowa	56.00	61.00	1959
Missouri	58.00	63.50	1959
Montana	60.00 After first 26 weeks of disability	65.00	1969
New York	80.00	95.00	1968
Ohio	56.00	63.00 Payable for first 12 weeks of disability	1967
Oregon	62.50	80.00	1959

[9] In New York, benefits may be awarded for loss of earnings in addition to loss of function—but these additional benefits are offset by 50% of any social security benefits [N.Y. Workmen's Compensation Law § 15(c)(v) (McKinney 1970)]. The Supreme Court of Colorado has construed the Workmen's Compensation Act, 1965 Perm. Supp. C.R.S. 1963, 81-12-1(4), to allow an employer to reduce payments under that Act when the employee becomes eligible for benefits under the Social Security Act. *Hurtado* v. *CF&I Steel Corporation*, — Colo. —, 449 P.2d 819 (1969).

pensation laws have been criticized because of inadequate provisions for survivor benefits for widows and children.[10] The lag in this area is easily traceable to the fact that the widows and children are entitled to social security benefits, so there is no incentive to extend workmen's compensation benefits to them.

Despite such limitations, workmen's compensation laws afford far broader protection than social security for worker injuries. It is the workers as a group who will be the ultimate losers if improvements in workmen's compensation benefits and coverage are discouraged. The decision below, unless reversed, will have precisely that effect. It could, we believe, contribute to the eventual demise of the workmen's compensation system.

The Offset Provision Contributes Toward Maintenance of Employer Responsibility

Workmen's compensation insurance is paid for by the employer, while social security contributions are made by both employer and employee. Thus, if social security assumes a greater proportion of disability compensation, the burden of providing for the injured workman will shift from employer to employee. Aside from its undesirable economic implications, this poses serious concern for job safety.

Because of the gearing of insurance premium costs to claim experience, the existence of workmen's compensation has given significant impetus to industrial

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[10] See ANALYSIS OF WORKMEN'S COMPENSATION LAWS, *supra*, at 26-27.

safety in the United States.[11] A reduction in accidents in a manufacturing plant serves to decrease the employer's insurance costs. However, if social security assumes a greater share of the disability benefit burden and the level of workmen's compensation is reduced, the significance of insurance cost is correspondingly reduced and, with it, the incentive for the development of vigorous and effective job safety programs.[12]

CONCLUSION

The foregoing demonstrates the reasonableness of Congress' determination to readopt an offset provision to prevent excessive duplication of social security and workmen's compensation disability benefits. This provision strengthens the effectiveness of the state laws and prevents a negation of their goal of rehabilitation. Congress saw the wisdom of maintaining strong state-level programs and recognized that the proportion of federal benefits should be sufficiently restrained to insure that these programs not be weakened nor their purposes frustrated.

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[11] The National Safety Council computes that the frequency of industrial accidents has experienced a significant reduction which parallels the expansion of effective workmen's compensation laws. In 1926 the industrial accident frequency rating was 31.87. By 1965 this was reduced to 6.53. In addition, the severity rate also dropped during that time from 2,500 man days per 1,000,000 man hours of employment to 689 man days. CASUALTY INSURANCE, *supra*, at 172-173.

[12] The Occupational Safety and Health Act of 1970, — Stat. —, established the National Commission on State Workmen's Laws. The Commission is required to study and report to the President by July 31, 1972, concerning, among other things, the "relationship between workmen's compensation on the one hand, and old age, disability, and survivors insurance and other types of insurance, public or private, on the other hand" [Section 27(d)(1)(O)].

The present offset results in no inequity. In addition to medical payments (including rehabilitation), the permanently disabled worker receives wage replacement benefits that approximate the take-home wage pay which he earned before his injury. Additionally, through automatic adjustments, these benefits increase with inflation and can result in benefits beyond the pre-injury wage. The offset is not only reasonable but necessary.

Therefore, we urge that the Court grant the prayer of the United States and reverse the judgment of the court below.

Respectfully submitted,

WILLIAM E. MILLER
RICHARD A. WHITING
JAMES L. MCHUGH, JR.
STEPTOE & JOHNSON
1250 Conecticut Avenue, N.W.
Washington, D.C. 20036
Counsel for Amici Curiae

Of Counsel:

STEPTOE & JOHNSON
1250 Connecticut Avenue, N.W.
Washington, D.C. 20036

April 15, 1971.